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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1286

ROBERT P. NEES,
Petitioner

v.

R. E. CULBERTSON,
Respondent

On Petition for Writ of Certiorai to
The United States Court of Appeals for
the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

This Petition seeks to review the decision of the United States Court of Appeals for the Fifth Circuit, the opinion being reported at 406 F.2d 621.

The Court of Appeals opinion affirmed the judgment of the United States District Court for the Eastern District of Texas, which wrote a memorandum opinion reported at 260 F.Supp. 791.

The decision of the Court of Criminal Appeals of Texas, which was attacked in the federal district court, is reported at 402 S.W.2d 186.

All of the foregoing opinions are appended to the Petition.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on January 28, 1969. Rehearing was denied on March 24, 1969. This Petition, alleging a denial of due process, was docketed on April 21, 1969. Accordingly, the jurisdictional requirements would appear to be satisfied although Respondent disputes Petitioner's contention that rights guaranteed by the Constitution of the United States have been denied.

QUESTION PRESENTED

Whether an indictment charging the Petitioner with misapplying public funds in the amount of $312.35 on or about July 31, 1959, provided him with adequate notice of the crime charged, when the evidence adduced at the state trial showed misappropriation of a $312.35 check in July of 1951, and the evidence further showed, from the testimony of Petitioner as well as other evidence, that the Petitioner had embezzled over $15,000 over a period of several years.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced by Petitioner in Appendix G to his Petition.

STATEMENT OF THE CASE

Petitioner had been a deputy sheriff of Jefferson County, Texas, since 1947. In that capacity, he received all funds paid to the Sheriff's office for fines, judgments, tax sales and other matters for which funds were collected. He then made bank deposits and disbursements of these funds.

On January 4, 1961, Nees informed J. M. Gowling, a deputy district clerk and former auditor, that he (Nees) was short in his accounts in the amount of about $15,000. In accordance with Gowlings advice, Nees disclosed the shortage to the sheriff. Later that same day Nees made a confession to an investigator for the District Attorney's office with regard to the shortage. The confession disclosed that Nees started taking money from the office funds because of a financial strain engendered by illness in the family. He estimated that he had appropriated from about $16,000 to $18,000 over a period of years. However, at the time of his confession, Nees did not reveal any specific items or amounts appropriated.

Nees was later indicted, the indictment charging a misappropriation of $312.35 on or about July 31, 1959. Because of the method by which the funds had been appropriated, it was necessary for the state to use accounting procedures over a period of time to show a shortage in the accounts of the Sheriff's office. This accounting period began in December of 1958 and ended in December of 1961.

The accounting evidence showed that a check in the amount of $312.35 payable to the Sheriff of Jefferson County was issued by the Port Arthur Independent School District representing a cost bill covering several taxes. No receipt was issued for this check and Nees did not make any account of it in his monthly disbursement report. However, there was a deposit of $312.35 during the month although this item could not be identified. The accounting evidence further showed that the Sheriff's office had total receipts for the month of July, 1959, of $4,372.69. Only $2,786.22 was deposited in the bank although, according to the accounting evidence the deposits should have totaled $4,685.04.

The accounting period used by the prosecution, which extended both before and after July, 1959, negated any possibility that the shortage revealed in July, 1959, was accounted for in months either prior to or subsequent to July.

At Petitioner's state trial, he admitted that his confession to the deputy district clerk, the sheriff and the investigator for the District Attorney's office was voluntary, and he admitted that he had taken between $16,000 to $18,000 over a period of years. He defended against the charge of appropriating moneys on July 31, 1959, by testifying that he was not in the Sheriff's office during the period from July 30 to August 3, 1959, and this absence from the office was supported in the testimony of his wife.

Petitioner was convicted and his punishment set at four (4) years imprisonment. The conviction was affirmed by the Court of Criminal Appeals of Texas at 402 S.W.2d 186 on March 16, 1966. Petitioner then applied to the United States District Court for the Eastern District of Texas for habeas corpus relief charging a denial of due process. This was denied in a memorandum opinion issued by that court on November 31, 1966, and reported at 260 F.Supp. 791. The judgment of the federal district court was affirmed by the United States Court of Appeals for the Fifth Circuit on January 28, 1969, rehearing being denied on March 24, 1969. The Court of Appeals opinion is reported at 406 F.2d 621.

Nees has now petitioned this Court to review the judgment of the Court of Appeals. His sole contention here is that the form of the indictment which alleged a misappropriation of $312.35 on July 31, 1959, did not give him adequate notice of the charge against him,

so as to enable him to prepare an adequate defense, where the state introduced evidence of the misapplication of moneys over a three year accounting period.

ARGUMENT AND AUTHORITIES

There Was Adequate Due Process Notice To Petioner Of The Charges He Would Face During His State Trial. There Was No Denial Of Fundamental Fairness.

Initially, observation should be made that the misapplication of an employer's moneys by an employee, extending over a period of time, is a type of criminal offense that is ordinarily not susceptible to proof by direct evidence.

The misappropriator seldom, if ever, works in the open and usually attempts to conceal his malfeasances by bookkeeping strategems. Moreover, a single shortage, on a single date can usually be accounted for defensively by showing the item or a like amount of money reached the proper depository at some time. Appropriated cash items ordinarily cannot be shown with specificity and must be brought to light by the use of an accounting period which can illuminate a shortage for a period of time although not, perhaps, any particular shortage. Accordingly, the nature of the crime usually necessitates the type of proof used by the prosecution in this case.

Parenthetically, note should be made that there is no problem involving double jeopardy present. Texas could not now or later bring a prosecution for any of the shortage proved at the trial. In *Ellis v. State,* 318 S.W.2d 665 (Tex.Crim. 1958), the Court of Criminal Appeals reversed a conviction for misappropriation of public funds because of a previous acquittal for the

same offense. The state claimed it was relying on different evidence, but the court replied to this contention by observing:

> "There was evidence introduced by the state in (the second case) that had been theretofore introduced in (the first case) which was sufficient to sustain a conviction in (the first case) and could have been used by the jury as a basis for either or both verdicts in said causes. Therefore, the former judgment of acquittal operates as a bar to the prosecution and conviction in this cause."

Thus, the method of proof used here, a running audit of the period before and after July 29, 1959, does not subject the Texas defendant to double jeopardy risks or to multiple prosecutions.

It should further be observed that rules governing the admission of evidence in criminal trials are not ordinarily subject to federal scrutiny and judgment. *Lisenba v. California,* 314 U.S. 219, 228-229 (1941). In *Spencer v. Texas,* 385 U.S. 554, 568-569 (1966), this Court determined that it would not impose its own evidentiary rule on the state courts. And in *Burgett v. Texas,* 389 U.S. 109 (1967) this Court stated at page 324:

> "We do not sit as court of criminal appeals to review state cases. The states are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution."

Accordingly, the crux of this case is whether the method of proof used by the state in this case, that of shortages in the funds of the Sheriff's office by an audit extending over a period prior to and subsequent to July 29, 1959, was violative of due process when the indictment merely alleged a shortage of some $312.25

on or about July 29, 1959. Here the proof showed not only a possible misappropriation of the amount set out in the indictment during the month of July but disclosed additional shortages during that month and over a period of years.

Actually, the problem may be said to be one of variance between the allegation of the indictment and the proof offered. The indictment charged the misappropriation of $312.25; proof showed a misappropriation of some thousands of dollars. The general rule, that the indictment allegations and trial proof must correspond, rests upon two propositions: (1) the accused should be advised of the charges against him so that he can prepare his defenses and (2) the accused will be protected against another prosecution for the same offense. *Berger v. United States,* 295 U.S. 78, 82 (1935); *Russell v. United States,* 369 U.S. 749 (1962).

As noted above, there is no problem in Texas involving double jeopardy or multiple prosecutions.

Moreover, in this case, there is no real problem present involving a lack of knowledge on the part of the Petitioner of the charges against him.

Nees knew that he had misappropriated moneys from the sheriff's funds for years. He knew that he had embezzled some $16,000 to $18,000. He knew that neither he or the State was able to pin-point any specific misappropriation or the date thereof. Nees further knew that the problem of identifying any particular item that was embezzled and its date was compounded by the fact that he had repaid some part of the moneys that he had taken from the office funds.

The critical question here is whether the proceedings were fundamentally unfair, so as to amount to a denial

of due process. Petitioner, of necessity, relies on a general "fairness" approach. As this Court noted in *Spencer v. Texas,* supra, (385 U.S. at page 565):

> "In this area (general fairness) the Court has always moved with caution before striking down state procedures."

Respondent vigorously asserts that there was no denial of fundamental fairness here and that, accordingly, there has been no infringement of due process.

CONCLUSION

For the reasons stated, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the Attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Phillip Bordages, 1345 Park Street, Beaumont, Texas 77701, on this the ____ day of May, 1969.

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